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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Municipalities – Employees, Employers,
Employment – Offices of Profit –
Legislators – Utilities – Cullman County

A member of the Alabama State
Legislature may serve as the Wastewater
Treatment Plant Superintendent for the
City of Good Hope.

Dear Ms. Nicholas:

This opinion of the Attorney General is issued in response to your request
on behalf of the City of Good Hope.

QUESTION

May a member of the Alabama State Legislature
serve as the Wastewater Treatment Plant
Superintendent for the City of Good Hope?

FACTS AND ANALYSIS

You informed this Office that, for the past two years, the mayor of the City of Good Hope has served as a full-time employee of the city in the position of Superintendent of the Good Hope Wastewater Treatment Plant. Recently, the mayor was elected as State Representative for District 12 in the Alabama Legislature. Although it is understood that the mayor will resign his position as mayor of Good Hope prior to being sworn in as a state legislator, the city questions whether, as a state legislator, he may continue to be employed as the Superintendent of the Wastewater Treatment Plant.

Section 280 of the Recompiled Constitution of Alabama and section 36-2-1 of the Code of Alabama prohibit an individual from holding two offices of profit simultaneously. ALA. CONST. art. XVII, § 280; ALA. CODE § 36-2-1 (2013). These provisions, which are practically identical, respectively state, in pertinent part, as follows:

No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this Constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds.

ALA. CONST. art. XVII, § 280.

(b) No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this state, nor shall any person hold two offices of profit at one and the same time under this state, except constables, notaries public and commissioners of deeds.

ALA. CODE § 36-2-1(b) (2013).

Section 59 of the Recompiled Constitution of Alabama is a provision applicable only to members of the Legislature. This provision states as follows:

No senator or representative shall, during the term for which he shall have been elected, be appointed to any office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by election by the people.

ALA. CONST. art. IV, § 59. This provision concerns members of the Legislature who are to be appointed to another office of profit. A member of the Legislature holds an office a profit. *Smith v. State ex rel. Mayor & Town Council of Citronelle*, 276 Ala. 378, 162 So. 2d 473 (1964).

The key determinant with respect to whether the provisions of the Code or the Constitution of Alabama are applicable to your inquiry is whether the position of superintendent of a wastewater treatment facility is considered an office of profit. In determining what constitutes an office of profit, this Office has stated that a person holds an office of profit if he or she exercises some part of the sovereign power of the state, and the person is entitled to compensation in that position. Opinion to Honorable Michael G. Kendrick, Attorney, Homewood City Council, dated April 27, 2012, A.G. No. 2012-057.

Previously, in an analogous matter, this Office was asked to determine whether a member of the Legislature may serve in one of the elected positions on the electrical utility board of the City of Tuskegee. Opinion to Honorable Johnny Ford, Member, House of Representatives, dated July 10, 2000, A.G. No. 2000-190. This Office determined that a member of the Legislature may serve in one of the elected positions on the electrical board of the City of Tuskegee. That opinion determined that section 59 of the Recompiled Constitution of Alabama was inapplicable to that particular inquiry because the member of the Legislature was elected to serve as a member of the utility board. *Id.*

In this matter, the member of the Legislature would not be serving in an elected position. Instead, the member of the Legislature would be appointed to serve as an employee of the city as the superintendent of the wastewater treatment facility. This Office has previously determined that a director of a municipal utility board does not hold an office of profit because such boards do not exercise sovereign power of the state. Opinion to Honorable Charley Foster, Mayor, Town of Coaling, dated June 27, 2000, A.G. No. 2000-182, *citing* opinion to Honorable Billy M. Bolton, Mayor, City of Red Bay, dated November 26, 1991, A.G. No. 92-00067.

Section 11-43-80(c) of the Code authorizes a municipality to require its mayor to act as the superintendent of the city's water treatment facility. This provision states as follows:

(c) In municipalities which own and operate light and power systems, municipal water systems, municipal sewage systems, and municipal gas systems, one or any of them, may, by resolution of the governing body duly entered in its minutes, require the mayor to act as superintendent of such system or systems and to give so much of his time thereof as the governing body may direct. In any municipality in which a municipal board or municipal public corporation owns and operates a municipal light and power system, municipal water

system, municipal sewage system, and municipal gas system, one or any of them, such board or municipal public corporation may, by resolution duly entered in its minutes, employ the mayor to act as superintendent of such system or systems and to give so much of his time thereto as such board or corporation may direct. The mayor, as such superintendent of such system or systems, shall serve as purchasing agent and make all purchases authorized by the governing body, board, or municipal public corporation therefor, and shall keep a check on meter readings and bids for service of the system and see that the collections thereof are made. He shall see that the system or systems are kept in proper repair and operation, shall keep an inventory showing the supplies and equipment on hand for such system or systems, shall keep a full and complete monthly financial statement of all operation costs and receipts and keep a proper inventory of the fiscal assets of such system or systems, and shall handle all such data and information relative to such system or systems available for the governing body, board, or municipal public corporation at such times as it shall require, but not less frequently than once every three months. For his service as superintendent of such system or systems, the mayor shall be paid, in addition to his salary as mayor, such sum as the governing body, board, or municipal corporation shall deem reasonable. The governing body, board, or municipal corporation may, at any time it deems best, dispense with the mayor's service as superintendent.

ALA. CODE § 11-43-80(c) (2008).

This provision sets out the duties of the superintendent of a municipal utility system. Nothing in the duties listed invests within the superintendent any portion of the sovereign power of the state. Accordingly, it is the opinion of this Office that a member of the Legislature may be appointed to the position of Superintendent of the Good Hope Wastewater Treatment Plant.

This Office notes that section 29-1-26 of the Code, the Legislative Double Dipping Provision, is inapplicable to this particular inquiry. ALA. CODE § 29-1-26 (Supp. 2014). Section 29-1-26 prohibits a member of the Legislature from serving in the Legislature while also during his or her term in office being

Honorable Rita P. Nicholas
Page 5

employed as an employee in another branch of state government. This particular inquiry, however, contemplates an instance where a member of the Legislature is employed by a municipality.

The legislator may also wish to submit any questions regarding potential conflicts of interest to the Alabama Ethics Commission for an opinion concerning applicable provisions of the Ethics Law.

CONCLUSION

A member of the Alabama State Legislature may serve as the Wastewater Treatment Plant Superintendent for the City of Good Hope.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

LS/MMG
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